Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CRAIG AVERY CASLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To the District Court of Appeal
of Florida, Fifth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant is provided ineffective assistance of counsel when his trial attorney fails to bring the perceived mental incompetency of the defendant, during a critical stage of the proceedings, to the attention of the trial court.

2. Whether a defendant is provided ineffective assistance of counsel when his trial attorney fails to object to the prosecutor's incomplete and misleading explanation of the definition of premeditation necessary to support a conviction for first degree murder.

3. Whether a trial court can deny a defendant's claim of ineffectiveness of counsel, based on counsel's failure to seek suppression of evidence, on grounds that the attorney made a reasonable strategy decision, without conducting an evidentiary hearing.

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Fifth District (Pet. App. at 1), is reported at 871 So. 2d 957 (Fla. 5th DCA 2004).

JURISDICTION

The judgment to be reviewed was entered by the District Court of Appeal of Florida, Fifth District, was entered on April 2, 2004. The district court denied Petitioner's timely motion for rehearing on April 2, 2004. (Pet. App. at 5). The nature of the district court's opinion rendered Petitioner unable to invoke the discretionary jurisdiction of the Florida Supreme Court. Thus, the district court was Petitioner's state court of last resort. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. This case involves questions of federal law that were decided by a state court of last resort in a way that conflicts with relevant decisions of this Court.

APPLICABLE CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATEMENT OF CASE

Petitioner, Craig Avery Casler, was charged by Indictment with first degree murder, in violation of Fla. Stat. §§ 782.04 and 775.087. (R5-920)[1]. After a jury trial, Petitioner was convicted as charged and sentenced to life in prison without the possibility of parole. (R7 at 1101-1104).

Petitioner subsequently filed a Motion for Postconviction Relief, pursuant to Fla. R. Crim. P. 3.850, in which he raised 10 grounds for relief. (Pet. App. at 62). In that motion, Petitioner argued, inter alia, that he was provided ineffective assistance of counsel because: (1) trial counsel failed to seek suppression of the oral, taped, and written statements obtained from Petitioner by law enforcement shortly after he was arrested and introduced those statements into evidence in the defense case-in-chief (Issue 7 of the Motion); (2) trial counsel failed object to the State's closing argument in which it provided the jury with an incomplete and misleading explanation of the premeditation necessary for a conviction of first degree murder (Issue 6 of the Motion); and (3) trial counsel conveyed the State's plea offer to him in an informational vacuum. (Issue 10 of the Motion). (Pet. App. at 62).

The trial court granted Petitioner an evidentiary hearing solely on Issue 10. (R7-1259). At the evidentiary hearing, Petitioner's attorney, F. Wesley Blankner, provided testimony. (RS[2] at 1400-45). Blankner testified about his discussions with Petitioner

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[1] Record citations are laid out in the following manner: (R2 at 6 = Volume 2 of the Record at Page 6).

[2] (RS = Supplemental Record).

concerning the second-degree-murder plea offer made by the State immediately prior to jury selection in Petitioner's trial.

Blankner acknowledged that there was a discussion on the record prior to the commencement of jury selection on May 11, 1998, where he told the trial court that the sentencing guidelines range for the state's plea offer was 30 to 50 years in prison. Blankner was corrected by the prosecutor, who indicated that 30 years was the middle of the guidelines, and thus, that the applicable range was from approximately 22.5 to 37.5 years in prison. (RS at 1428-1431; R1 at 71-73).

Blankner further testified that, in his 25 years of practice, Petitioner was the most difficult client he had ever had to communicate with. (RS at 1402, 1419). Blankner also stated that, on the day he relayed the plea offer to Petitioner, he believed that Petitioner was not mentally competent to understand the ramifications of that offer. (RS at 1431-32, 37-39).

Both Petitioner and the State provided the trial court with their final arguments in writing. Based on Blankner's testimony at the evidentiary hearing, Petitioner argued that he was deprived of the effective assistance of counsel when Blankner failed to bring his perceived mental incompetency to the attention of the trial court. (Pet. App. at 47). The trial court subsequently denied Petitioner's Rule 3.850 motion in its entirety. (Pet. App. at 41).

The trial court denied relief on Issue 6 of Petitioner's motion (IAC-improper closing argument) without an evidentiary hearing, concluding that Petitioner suffered no prejudice from any inaccurate statement of the law the prosecutor may have made concerning the element of premeditation. (Pet. App. at 41).

The trial court denied relief on Issue 7 of Petitioner's Motion (IAC-failure to seek suppression of defendant's statements),

concluding, without an evidentiary hearing, that trial counsel reasonably used the Petitioner's statements to bolster his insanity and voluntary intoxication defenses. (Pet. App. at 41).

The trial court denied Petitioner's Rule 3.850 motion without addressing his claim that trial counsel provided ineffective assistance of counsel by failing to bring his perceived inability and incompetency in participating in plea discussions to the attention of the trial court. (Pet. App. at 41). Petitioner filed a timely notice of appeal from the trial court's denial of his motion for postconviction relief. (R7-1348). On appeal, Petitioner argued, inter alia, that he was provided ineffective assistance of counsel because his trial attorney had (1) failed to bring his perceived incompetency to the attention of the trial court at a critical stage the proceedings; (2) failed to object to the prosecutor's improper closing argument regarding the definition of premeditation; and (3) had failed to seek suppression of his involuntary statements. Petitioner further argued that the trial court had erred in denying claims (2) and (3) without an evidentiary hearing. (Pet. App. at 6).

The District Court of Appeal of Florida, Fifth District, affirmed the trial court's decision to deny Petitioner's Rule 3.850 motion. The district court failed to specifically address the three claims contained in this petition, but merely concluded that "there is evidence to support the trial judge's decision." (Pet. App. at 1). Petitioner filed a timely Motion for Rehearing/Clarification, seeking to obtain the basis for the district court's ruling. The district court denied Petitioner's motion. (Pet. App. at 5).

ARGUMENT

I. PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO BRING HIS PERCEIVED INCOMPETENCY, DURING A CRITICAL STAGE OF THE PROCEEDINGS, TO THE ATTENTION OF THE TRIAL COURT.

The testimony of trial counsel Blankner at the evidentiary hearing established that he provided Petitioner with ineffective assistance of counsel at a critical stage of the proceedings. Despite his belief that Petitioner was mentally incompetent and unable to understand the plea offer made by the State immediately prior to trial, Blankner failed to convey that belief to the trial court.

"The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process." *Iowa v. Tovar*, 124 S.Ct. 1379, 1387, 158 L.Ed.2d 209 (2004). A trial is rendered fundamentally unfair if the accused is denied counsel at a critical stage of the proceedings. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984).

"As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" There is an exception, however, where the defendant has been deprived of the assistance of counsel during a critical stage of the proceedings. In such a case, there is a presumption that the defendant has been denied his right to a fair trial. *Mickens*

v. Taylor, 535 U.S. 162, 166, 122 S.Ct. 1237, 1241, 152 L.Ed.2d 291 (2002); *Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 1038, 145 L.Ed. 2d 985 (2000).

This Court had consistently recognized that proceedings relating to the process of entering a plea are a critical stage. *Tovar, supra*; *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963).

The test of a defendant's competency to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (emphasis added); *See also Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 499 (1996); *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995). "The right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Cooper*, 517 U.S. at 1377 n.4.

Since a finding of incompetency precludes the state from seeking a conviction, the failure to take action to determine a defendant's competency constitutes ineffective assistance of counsel where there is evidence to support the defendant's incompetency. *Broomfield v. State*, 788 So. 2d 1043 (Fla. 2d DCA 2001).

In this instant case, Petitioner's trial counsel, F. Wesley Blankner provided unequivocal testimony that, on the day he relayed the State's plea offer to Petitioner, he believed that Petitioner was not competent to understand the ramifications of that offer. When asked to clarify that testimony, Blankner confirmed that, when he conveyed the plea offer to Petitioner immediately prior to the start

of jury selection, he did not believe that Petitioner was mentally competent to stand trial. (RS at 1431-32, 37-39).

Despite Blankner's belief that Petitioner was not mentally competent to proceed to trial, and that he did understand the ramifications of the plea offer being conveyed to him, Blankner failed to raise this issue with the trial court. He did not file a motion to declare Petitioner incompetent or even mention his belief to the trial court. As clearly defined by this Court, the proceedings relating to a defendant's decision to enter a plea are a critical stage of the proceedings. Therefore, Petitioner was completely deprived of the effective assistance of counsel, and his subsequent trial should be considered presumptively unfair.

The fact that Blankner had previously filed a motion to have Petitioner declared mentally incompetent to proceed to trial, which had been denied by the trial court, does not establish that his conduct was not ineffective. "Once a defendant is declared competent, the trial court must still be receptive to revisiting the issue if circumstances change." *Hunter*, 660 So. 2d at 248; *See also Drope v. Missouri*, 420 U.S. 162, 180-81, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

Under Florida law, pursuant to Fla. R. Crim. P. 3.210, an attorney is permitted to file a motion to declare a defendant mentally incompetent to proceed at any time the attorney has "reasonable grounds" to believe the defendant is incompetent. Rule 3.210(b) provides, in pertinent part, the following:

> If, at any material stage of a criminal proceeding, the court of its own motion, or upon motion of counsel for the defendant or for the state, has reasonable grounds to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a

> hearing to determine the defendant's mental condition.

Here, Blanker provided unrefuted testimony that, at the time he conveyed the State's plea offer to Petitioner, he did not believe that Petitioner was competent to understand the ramifications of that offer. Therefore, immediately prior to the commencement of Petitioner's trial, Blanker had reasonable grounds to believe that Petitioner did not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. *See Cooper, Dusky, supra*. Blankner's failure to make the trial court aware of this belief, through a motion to declare Petitioner incompetent to stand trial, constitutes ineffective assistance of counsel.

Both the state trial court and the district court failed to specifically address this issue, despite the fact that it was timely raised in Petitioner's final argument on his Rule 3.850 motion, and in Petitioner's Initial Brief. (Pet. App. at 6, 47). The decisions of those courts to deny relief to Petitioner is contrary to the aforementioned decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be granted on this issue.

II. PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S INCOMPLETE AND MISLEADING EXPLANATION OF THE DEFINITION OF "PREMEDITATION" NECESSARY TO SUPPORT A CONVICTION FOR THE CRIME OF FIRST DEGREE MURDER.

Petitioner was deprived of the effective assistance of counsel when his trial attorney failed to object to the prosecutor's repeated incomplete and misleading explanation of premeditation during closing argument. Trial counsel's action was both deficient and highly prejudicial to Petitioner.

In order to establish a valid claim of ineffective assistance of counsel, a defendant must establish (1) that trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. To show a reasonable probability, the defendant must merely establish a probability sufficient to undermine confidence in the outcome, not that counsel's error definitely altered the outcome of the trial. 466 U.S. at 695.

Under Florida law, premeditation is defined as follows:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit

reflection as to the nature of the act to be committed and the probable result of the act.

Coolen v. State, 690 So. 2d 738, 741 (Fla. 1997) (emphasis added); *See also Evans v. State*, 838 So. 2d 1090, 1095 (Fla. 2002); Fla. Std. Jury Instr. (Crim.) 7.2.

The improper comments of the prosecutor in the instant case are extremely similar to those in *Waters v. State*, 486 So. 2d 614 (Fla. 5th DCA 1986). In *Waters*, during jury selection, the prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the mind." The prosecutor failed to include "reflection," which is an integral second requirement for premeditation. The district court held that the trial court erred in permitting the prosecutor to define premeditation in this manner because it allowed the improper definition to form in the jury's mind. The district court reversed the defendant's conviction and remanded the case for a new trial.

The district court's opinion in *Waters* makes no mention of the instruction on premeditation the trial court provided to the jury at the close of the case. Based on this lack of discussion, Petitioner assumes that the trial court properly defined premeditation, but that the district court concluded that the trial court's action did not cure the error by the prosecutor.

On two separate occasions, the prosecutor in the instant case provided the jury with an incomplete and misleading definition of premeditation by failing to include the element of reflection. First the prosecutor, in explaining premeditation, stated that "[a]ll we have to prove to you beyond a reasonable doubt is that when he killed her, that in his mind at that moment was a decision that he wanted her to be dead. That's all." (R4-741) (emphasis added). The prosecutor further stated that "if you are convinced beyond a reasonable doubt that when he wrapped that ligature

around her neck and squeezed it, he did so because he had decided he wanted her dead, then we have met our burden. That's all we have to do." (R5-742) (emphasis added).

Both of these statements failed to include the element of reflection necessary to establish premeditation. At the end of each statement, the prosecutor stated that the description he had just provided was all that he was required to prove. Therefore, the prosecutor provided the jury with two different incomplete and misleading definitions of premeditation.

As in *Waters*, an improper definition of premeditation was allowed to form in the jury's mind. The sole difference between a conviction of first degree murder (life sentence without possibility of parole) and conviction of second degree murder (determinate sentence) was the jury's determination that the killing was premeditated.

In denying Petitioner's claim on this issue, the trial court merely concluded that "Defendant suffered no prejudice from any inaccurate statement of law the prosecutor may have made." In further support of its decision, the trial court cited the fact that the jury was properly instructed by the court on the issue of premeditation and that the jury was told that the closing arguments of counsel did not constitute evidence. (Pet. App. at 41). Neither of these facts were sufficient to cure the effect of the prosecutor's repeated misstatement of the law on this critical issue, because the incorrect definition of premeditation was allowed to form in the jury's mind. *See Waters*, *supra*. Moreover, the trial court made no finding as to the deficiency of counsel and failed to further explain why no prejudice resulted from the prosecutor's repeated misstatement of the law. (Pet. App. at 41).

Trial counsel's failure to object to the prosecutor's improper closing argument was both deficient and highly prejudicial. There

is a reasonable probability that, in absence of the prosecutor's repeated misstatement of law on the issue of premeditation, Petitioner would not have been convicted of first degree murder. The improper definition provided to the jury clearly undermines confidence in the verdict.

Therefore, the trial court's decision to deny Petitioner relief on this claim without an evidentiary hearing, and the district court's summary denial of this claim is directly contrary to *Strickland* and its progeny. Accordingly, this Court should grant the Petition for Writ of Certiorari on this issue.

III. THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON COUNSEL'S FAILURE TO SEEK SUPPRESSION OF EVIDENCE, ON GROUNDS THAT THE ATTORNEY MADE A REASONABLE STRATEGY DECISION, WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

Both trial counsel's failure to seek the suppression of Petitioner's statements, and his actions in introducing those statements into evidence at trial constituted ineffective assistance of counsel. Trial counsel's actions were both deficient and highly prejudicial to Petitioner. The trial court's decision to deny Petitioner's Rule 3.850 Motion on this issue, based solely on a conclusion that trial counsel's decision not to seek suppression and to use the statements in support of Petitioner's defense, was a reasonable strategy decision, was improper in absence of an evidentiary hearing.

Clearly, any confession or statement on the part of a defendant must be voluntary before it is admissible at trial. Such a confession may be inadmissible as involuntary while a defendant is under the influence of alcohol or narcotics. *Cox v. State*, 711 So. 2d 1323 (Fla. 5th DCA 1998) (confession only voluntary where defendant is able to comprehend what he is doing and to communicate with coherence and rationality).

In the instant case, both the circumstances surrounding Petitioner's statements and the content of the statements establish that they were not voluntary. (R4 at 635, 637-44, 45). There was substantial evidence that Petitioner was highly intoxicated and suffering from mental illness at the time he provided those statements. Based on those facts, trial counsel had legal grounds to seek suppression of those statements, but chose not to do so. Instead, trial counsel introduced those statements in the defense case in chief.

The introduction of Petitioner's statements were highly prejudicial because they (1) corroborated the testimony of James Cook, the individual who discovered Petitioner with the dead body of the victim; (2) corroborated the motive for murder advanced by the state; and (3) contradicted the defense that Petitioner was in an "alcoholic blackout" at the time of the offense.

Despite these facts, the trial court failed to conduct an evidentiary hearing on this issue. The trial court merely concluded that the actions of trial counsel were reasonable strategy, because the statements were used to support Petitioner's insanity and voluntary intoxication defenses. The trial court did not cite to the record in support of its decision. (Pet. App. at 41).

The trial court's decision, affirmed by the district court without specific reference to this issue, was improper. Several Florida appellate courts have held that the evaluation of strategic

decisions requires resolution through an evidentiary hearing. *McCann v. State*, 854 So. 2d 788 (Fla. 2d DCA 2003); *Guisasola v. State*, 667 So. 2d 248 (Fla. 1st DCA 1995); *Comfort v. State*, 597 So. 2d 944 (Fla. 2d DCA 1992).

The trial court's decision is improper because the reason trial counsel did not seek pretrial suppression and introduced Petitioner's statements into evidence does not appear in the record. Even if trial counsel introduced the statements in order to bolster Petitioner's defenses, such a strategy cannot be considered reasonable when the statements also corroborate the testimony of the state's main witness and provide the jury with a motive for the charged offense.

This Court addressed a similar situation in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In *Morrison*, the defendant claimed he was provided ineffective assistance of counsel based on trial counsel's failure to file a pretrial motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. After concluding that the defendant's claim was not precluded from being reviewed in federal court because it involved a Fourth Amendment issue, and that counsel had acted incompetently, this Court remanded the case for an evidentiary hearing on the issue of prejudice. The Court concluded that, in absence of an evidentiary hearing, the record was insufficient on this issue.

In the instant case, the record is insufficient on both the issue of counsel's competency and the resulting prejudice, because no evidentiary hearing was conducted on this issue. There has been no inquiry into either the actual reason for counsel's actions or into the conversations counsel had with Petitioner on this matter. In *Strickland*, this Court explicitly noted that inquiry into counsel's conversations with the defendant may be critical to a

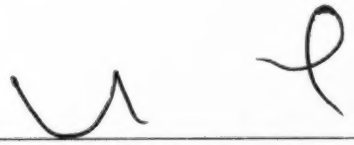
proper assessment of a trial counsel's litigation decisions. 466 U.S. at 691.

Therefore, this Court should adopt the rule established by the aforementioned state courts, that an evidentiary hearing is required to evaluate strategic decisions of trial counsel. Accordingly, this Court grant the Petition for Writ of Certiorari on this issue.

CONCLUSION

For the reasons stated above, CRAIG AVERY CASLER respectfully petitions this Court for a writ of certiorari.

Respectfully Submitted,



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